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In The

Supreme Court of the United States

October Term 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., ET AL.,

Appellees

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF AMICI CURIAE ON THE MERITS

AMMON G. DUNTON, JR.
DEXTER C. RUMSEY, III
MATSON C. TERRY, II
Dunton, Simmons & Dunton
P. O. Box 5
White Stone, Virginia 22578

Attorneys for Amici Curiae

Virginia Seafood Council
L. D. Amory & Company, Inc.
Chesapeake Herring Corp.
The D. L. Edgerton Co.
Lance C. Fisher
J. W. Ferguson Seafood Co., Inc.
Fass Bros., Inc.
Mr. Frosty Seafood Company
J. H. Lewis Seafood Company
W. F. Morgan & Sons, Inc.
RCV Seafood Company
Shackelford-Schlifer Seafood Corp.
Virginia Seafoods, Inc.
Zapata Haynie Corporation

PHILIP B. KURLAND
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345

Of Counsel

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BRIEF AMICI CURIAE ON THE MERITS

INTERESTS OF AMICI CURIAE

The interests of the *amici curiae* are set out in the motion for leave to file and brief in support of the statement as to jurisdiction. On that motion, *amici curiae* moved "that their petition to file a brief *amici curiae* in support of Appellant's Jurisdictional Statement, as well as his brief on the merits, be granted." (p. vi) On 26 April 1976, this Court granted the motion: "The motion for leave to file a brief *amici curiae* is granted." If that leave was solely for the brief in support of the jurisdictional statement, we respectfully renew our motion, for the reasons heretofore asserted, for leave to file this brief on the merits.

OPINION BELOW

The opinion below was entered by a three-judge court for the Eastern District of Virginia on 7 November 1975. It is

not yet reported. Copies of the opinion and final order are set forth in the Appendix A to our brief in support of the jurisdictional statement.

JURISDICTION

A final order granting an injunction against the enforcement of §§ 28.1-60 and 28.1-81.1 of the Code of Virginia of 1950, as amended, was entered on 7 November 1975 by a three-judge district court convened under 28 U.S.C. § 2284. The jurisdiction of this Court rests on 28 U.S.C. § 1253. This Court noted probable jurisdiction of this appeal on 26 April 1976.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Interstate Commerce Clause, Article I, § 8, cl. 3; the Supremacy Clause, Article VI, ¶ 2; and the Equal Protection Clause, Amendment XIV, § 2.

The statutory provisions are 16 U.S.C. § 1081 and Virginia Code §§ 28.1-60 and 28.1-81.1.

These are set out in full in Appendix A.

QUESTIONS PRESENTED

1. Do state laws that prohibit a foreign-owned corporation from invading fisheries in state territorial waters, and a non-resident corporation from taking a specific class of fish from an inland sea, violate the Commerce Clause or the Equal Protection Clause of the Fourteenth Amendment?

2. Does the Bartlett Act, 16 U.S.C. §§ 1081 et seq., preempt state authority over its territorial waters, although the state authority has existed since 1781 and the terms of the Act, its purpose, its legislative history, and other federal legislation all speak against such preemption?

STATEMENT

This case is concerned with the right of the Commonwealth of Virginia to protect its fisheries against depredations by the Appellees, corporate subsidiaries of an English corporation.

The fisheries in question are the Chesapeake Bay, an historic inland sea recognized as such by the United States government,[1] and the marginal sea extending from the Virginia Coast into the Atlantic Ocean to the extent of three miles. The statutes involved in this appeal make no attempt to regulate or control the issuance of licenses for the taking of fish in the United States Fisheries Conservation Zone, which commences at the three mile limit and extends seaward, and which is recognized by all parties to be under exclusive federal jurisdiction.

Section 28.1-81.1 of the Virginia Code regulates the issuance of licenses for the taking of all fin fish within either the Chesapeake Bay or the marginal sea, requiring that all licensees be United States citizens. The Appellees cannot qualify for a license under this law because they are not United States citizens but foreign-owned corporations. As non-residents, Appellees cannot qualify under § 28.1-60 of the Virginia Code which regulates issuance of licenses for a specific Virginia fishery, menhaden fishing in the Chesapeake Bay.

Appellees have not heretofore fished in the Chesapeake Bay nor have they engaged in any significant fishing in Virginia marginal sea for at least the last fifteen years.[2] They have not been in competition with domestic fishermen for the taking of menhaden in Virginia territorial waters.

Menhaden is one of the most valuable fishery resources

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[1] The Convention of the Territorial Sea and The Contiguous Zone was adopted for purposes of the Submerged Lands Act in *United States* v. *California*, 381 U.S. 139, 161-167 (1965) and *United States* v. *Alaska*, 422 U.S. 184 (1975).

[2] See Stipulations Stated By Counsel in Open Court at 2-3.

located in Virginia territorial waters. Although menhaden are found in some measure from Maine to Florida, the Chesapeake Bay acts as a nursery for the development of the fish. While final data is not yet complete, studies over the last several years indicate that fish spawn off the Virginia and North Carolina capes and large numbers enter the sheltered waters of the Chesapeake Bay and its tributaries as fingerlings. In the estuarine waters of the major tributary rivers (which by statute in Virginia are protected against menhaden fishing by anyone) the small menhaden develop in great quantities. As they mature into fish of from one to two years of age they school in the Bay between May and December of each year and form the basis for the resource fished by the Virginia industry. In the winter and spring many of the larger fish leave to spawn at sea and thence to range along the Atlantic Coast. Alone among the Atlantic states, Virginia imposes seasonal limits on the fishing for menhaden, limitations on net mesh size and protects selected waters for small fish development.

While menhaden, as most fin fish, are quite mobile and as older fish range for considerable distances, the distinguishing feature of menhaden in Virginia waters during their first two years of life is their relative stability. They form a particularly stable population as one and two year old fish in the Chesapeake Bay during the Virginia menhaden fishing season extending from May to December. It is against this relatively stable fishing stock that the Virginia menhaden fishing effort is directed.

The season is changed periodically and the fishing effort imposed upon this resource is adjusted from time to time, based upon the recommendations of scientists at the Virginia Institute of Marine Science and the National Marine Fisheries Service and the Virgina producers. The resource is recognized by the participants as being of immense value, but requiring great care in terms of its preservation.

Since the earliest days of the Republic, both the states and the national government have exercised concurrent control over the commercial fisheries of the United States, particularly those in the marginal sea. The United States has controlled the documentation of fishing vessels, providing for their register or enrollment. The states on the other hand have licensed the taking of fish within territorial waters of the state, and have provided all management regulations relating to the fisheries. Thus, in order to fish within the marginal sea it has always been necessary for a vessel to be documented by the United States and to have a license to fish from the state from whose waters the fish are to be taken. Appellees have questioned the long established authority of the states to issue licenses for the taking of fish from the states' territorial waters.

The Appellees here, plaintiff below, English-owned fishing corporations, brought suit to enjoin the enforcement of two provisions of the Virginia Code governing the taking of fish off the Virginia shores and in the Virginia bays. The first of these is § 28.1-60 of the Code of Virginia of 1950, as amended; the second is § 28.1-81.1 of the same Code.

It was on 23 March 1871 that the General Assembly of the Commonwealth adopted the predecessor of § 28.1-60. While the provision has been amended from time to time with regard to matters not relevant here, it has remained substantially the same for the last thirty-eight years.

In essence, § 28.1-60 prohibits Appellees from taking fish for the purpose of converting the same into oil, fish meal, etc., except as provided in § 28.1-60(e). The effect of the statute is to prohibit Appellees from taking menhaden within Virginia's chief inland sea, the Chesapeake Bay.

The second statute under attack is § 28.1-81.1 of the Code of Virginia of 1950, as amended, which was signed by the Governor of Virginia and became effective on 19 March 1975. The effect of this statute is to reserve the harvesting

of fish in Virginia waters to citizens of the United States. It is intended to deal with the problem of the threatened destruction of Virginia's fisheries by foreign fishing practices. Foreign-owned corporations, unlike domestic fishermen, have no interest in preserving rather than exhausting local fisheries. As a result of overfishing by foreign interests, Virginia has experienced the virtual elimination of certain formerly important fisheries, such as the river herring.

Realizing that the 200 mile fisheries limit legislation before Congress would soon become a reality, and further realizing that such action would create new impetus for foreign fishing fleets to seek all available legal means to operate in coastal waters of the states, various fisheries interests, including several of the companies acting as *amici curiae* herein, testified as to the effect of foreign fishing practices on fishing stocks in support of legislation before the General Assembly to close the "loophole" which would permit foreign-owned fishing vessels to fish (through shell corporations) in Virginia waters. The statements of Ammon G. Dunton, Jr. and Allen W. Haynie, in support of this legislation before the Committee on Agriculture, Conservation and Natural Resources, in the Virginia State Senate, and the Committee on the Chesapeake and Its Tributaries, in the House of Delegates respectively are annexed hereto as Appendices B and C to indicate the purpose of this legislation. The bill was also recommended by the unanimous vote of the Virginia Marine Resources Commission at a duly convened meeting on 28 January 1975. The bill was voted out of the Senate committee without a dissenting vote. Upon the floor of the Senate, consisting of 40 members, the bill was adopted by the vote of 40 to 0. In the House of Delegates, the bill was referred to the Committee on the Chesapeake and Its Tributaries, which approved the bill by unanimous vote. On the floor of the House the bill was approved as emergency legislation by the vote of 85 to 0.

Appellees are English-owned corporations organized and with their principal places of business outside of the Commonwealth of Virginia. Seacoast Products, Inc., the parent corporation among the Appellees, although organized under the laws of New York, is wholly owned by Hanson Trust Ltd., an English corporation.

On 22 May 1975, one of the Appellees, The New Smith Meal Company, Inc., made application for a Virginia license to fish for menhaden in Virginia territorial waters. That license was denied because § 28.1-81.1 of the Virginia Code forbids the issuance of such licenses to non-citizens of the United States.

This action was instituted on 14 July 1975. It sought to enjoin Appellant from enforcing §§ 28.1-60(3) and 28.1-81.1 upon the grounds that said provisions violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment and upon the ground that the statutes place an undue burden on interstate commerce. On 18 July 1975, a special three-judge court was designated to consider the issues. On 7 November 1975, a judgment and opinion were rendered sustaining a motion by Appellees for summary judgment.

The three-judge court held that the Virginia laws in question violated the Appellees' Equal Protection rights by distinguishing between citizens and non-citizens and between residents and non-residents for purposes of issuing licenses for fishing in Virginia territorial waters and in the Chesapeake Bay. It did not resort to the Commerce Clause argument put forward by Appellees. Nor did it consider the due process issue, which has not been further argued by Appellees. But it did, on its own accord, conclude that the subject was preempted by federal law, the Bartlett Act, 78 Stat. 194, 16 U.S.C. §§ 1081 *et seq.*

It is from this judgment that this appeal has been taken.

ARGUMENT

It is important to recognize at the outset that Appellees are constitutionally neither "citizens" nor "aliens," but, at best, only "persons."[3]

The importance of the fact that they are not citizens is established by *Asbury Hospital* v. *Cass County,* 326 U.S. 207, 211 (1945). The Court there held that a foreign corporation: "is neither a citizens of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution and the Fourteenth Amendment." The Court continued: "The Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it."

The importance of the fact that Appellees are not aliens lies in their consequent inability to call on the Naturalization Clause, Art. I, § 8, cl. 4, and the inferences drawn therefrom that aliens are subject to control by the national and not the state government, at least in some instances. *Compare Graham* v. *Richardson,* 403 U.S. 365 (1971) *with Mathews* v. *Diaz,* 44 L.W. 4748 (1 June 1976); *and Sugarman* v. *Dougall,* 413 U.S. 634 (1973) *with Hampton* v. *Mow Sun Wong,* 44 L.W. 4737 (1 June 1976).

I.

The Virginia Statutes In Dispute Do Not Unduly Burden Interstate Commerce.

It should be noted that the statutes in question are concerned solely with the "taking" or "catching" of fish. They are not concerned with the movement of fish already caught or with the processing of fish or fish products.

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[3] While corporations have been held to be "persons" within the meaning of the Fourteenth Amendment, on what are obviously dubious grounds, see Mr. Justice Black, dissenting in *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U.S. 77, 85-90 (1938), we have discovered no case to afford either a holding or rationale for extending this category to foreign-owned corporations.

A. Taking Fish In State Waters Is A Matter Of Local Concern, Not Controlled By The Commerce Clause Of The United States Constitution.

Taking fish in state territorial waters is a matter of local concern, occurring before such fish enter interstate commerce. Chief among the precedents so holding is the case of *Toomer* v. *Witsell,* 334 U.S. 385 (1948). In *Toomer,* this Court held that the Commerce Clause was not violated by a state law regulating the taking of shrimp in coastal waters.

> Nor does the statute violate the commerce clause. It does not discriminate against interstate commerce in shrimp, and the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce. [*Id.* at 394-395.]

More recently *State of Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961), reiterated the *Toomer* position. *Arctic Maid* concerned Alaska's power to tax the operations of a freezer ship in state territorial waters. Rejecting the suggestion that the Alaska statute unduly burdened interstate commerce, this Court stated:

> The process of gathering fish either through catcher boats that are part of respondent's fleet or through independent operators is a "local activity" . . . in a vivid sense of the term. We see no reason why our cases involving the taking of shrimp (*Toomer* v. *Witsell, supra*) and extraction of ore . . . are not dispositive of this controversy . . . . In both [cases] the local product is promptly loaded for interstate shipment. But in each there is a preliminary local business being conducted—an occupation made up of a series of local activities which the state can constitutionally reach. [*Id.* 203-204.]

To counter the law established by this Court, Appellees would place primary reliance upon *Foster-Fountain Packing Co., Inc.* v. *Haydel,* 278 U.S. 1 (1928), decided prior to *Toomer* and *Arctic Maid. Foster-Fountain Packing Co., Inc.*

was directly concerned with a Louisiana statute that prohibited the shipment out of the state of any shrimp from which the heads and hulls had not been removed, thus attempting to insure that all processing was done in Louisiana. The Virginia statutes challenged here do not attempt to impede the movement of fish in interstate commerce after they have been taken. See *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422, 426-427 (1936).

Not only do the precedents discussed above indicate that fishing activities are purely local matters, but policy and logic also lead to that conclusion. In matters of peculiarly local impact, such as fishing, the state is in the best possible position to recognize and correct the myriad problems with which it alone is faced. The nature of those problems vary from state to state and the appropriate remedies cannot be fitted to a Procrustean bed. The lobster industry in Maine differs widely from the sponge fishing industry in Florida, both of which are different from the menhaden activities in Virginia. Local fishing activities are decidedly not susceptible to a single national regulatory program.

The states have traditionally been regarded as having retained the power to regulate and control fishing in their territorial waters. To deprive the states of this authority under the guise of the Commerce Clause, would be to disregard the fundamental distinctions enunciated as long ago as *Geer* v. *Connecticut,* 161 U.S. 519 (1896), as to the very structure of government provided by the Constitution.

B. Even If Taking Fish Were A Part Of Interstate Commerce, The Virginia Statutes In Dispute Do Not Impose An Undue Burden.

That a particular commercial activity is an aspect of interstate commerce does not, in the absence of federal preemption, remove it from the control of state law. This principle has been clearly enunciated in the landmark cases on the subject. Thus, in *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767 (1945), this Court said:

> [I]t has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. . . . Thus the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress. . . . When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. . . .

This opinion, together with *Freeman* v. *Hewit,* 329 U.S. 249 (1946); *Parker* v. *Brown,* 317 U.S. 341 (1943); *South Carolina State Highway Dept.* v. *Barnwell Bros.,* 303 U.S. 177 (1938); and the cases cited in the previous section, make clear that state interests are entitled to protection even where they may affect interstate commerce, so long as the state's interest is legitimate and the national government has not chosen to impose a rule of its own.

The challenged statutes are designed for effective enforcement of a well-reasoned conservation program which includes necessary limitations on net size, fishing season, and fishing areas. Just as the prevention of air pollution is a matter of local health within state police power, *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 448 (1960), the treatment of problems which beset local fisheries is also a matter of local concern within state police power. Such local resource management programs clearly do not disrupt a uniformity of regulation which has not existed, does not now exist, and could not reasonably exist in the future due to the widely varying nature of the fishing industry from state to state.

Appellees would rely on their assertion of an improper legislative motive as the reason for rejecting local legislation directed at a local problem. Suffice it to respond that

this court has consistently held that state statutes are entitled to a presumption of constitutionality. See generally *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974); *Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144 (1944); *Alaska Packers Ass'n.* v. *Industrial Accident Commission of California,* 294 U.S. 532 (1935); *Borden's Farm Products* v. *Baldwin,* 293 U.S. 194 (1934).

II.

The Virginia Statutes Have Not Been Preempted By Federal Law.

In its final order, the court below held as follows:

> In our judgment this legislation (Act of Congress approved May 20, 1964, 78 Stat. 194, 16 U.S.C. 1081, *et seq.*) preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them.
>
> The decisions heretofore cited—*Toomer, California, Skiriotes* and *Manchester, supra*—determining Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit.

In short, the trial court held that the respective states have no power in the marginal sea.

Respectfully, we submit that the cited cases do not support such a conclusion. Witness the following language of this Court in *Toomer:*

> [The appellants] urge that South Carolina has no jurisdiction over coastal waters beyond the low-water mark. In the court below *United States* v. *California,* 332 U.S. 19 (1947), was relied upon for this proposition. Here appellants seem to concede, and correctly so, that such is neither the holding nor the implication of that case; for in deciding that the United States, where it asserted its claims, had paramount rights in the three-mile belt, the Court pointedly quoted and supplied emphasis to a statement in *Skiriotes* v. *Florida,* 313 U.S. 69, 75 (1941), that "It is also clear that Florida has an interest in the proper

> maintenance of the sponge fishery and that the [state] statute *so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State."*
>
> Since the present case evinces no conflict between South Carolina's regulatory scheme and any assertion of federal power, the District Court properly concluded that the State has sufficient interests in the shrimp fishery within three miles of its coast so that it may exercise its police power to protect and regulate that fishery. [334 U.S. at 393.]

The proper question is not whether the national government's paramount interests preclude state regulation—they clearly do not—but whether there is evidence of national legislation that preempts Virginia's particular regulatory action here. There is no such legislation.

A. The Power Of The Individual States To Regulate Fisheries In State Inland Waters And In The Marginal Sea Has Not Been Preempted By The Bartlett Act, 16 U.S.C. §§ 1081, et seq.

Heretofore it has been recognized that the power to regulate fisheries within the boundaries of the respective states was reserved to the states. *Toomer* and *Skiriotes, supra,* are ample evidence of this proposition. But the principle carries older credentials than these. For example, in a context clearly pertinent to that of this case, in *Manchester* v. *Massachusetts,* 139 U.S. 240, 258 (1891), this Court ruled:

> [T]he right to the fisheries and the power to regulate the fisheries on the coasts and in the tide-waters of the State were left, by the Constitution of the United States, with the States, subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic.

See also *Bayside Fish Flour Co.* v. *Gentry, supra,* where this Court, in holding that the statute in issue did not violate the Commerce Clause, or the Due Process or Equal Pro-

tection Clauses of the Fourteenth Amendment, confirmed the regulatory power of the state.

This proposition has since been reinforced by Congressional Legislation; the Submerged Lands Act, 43 U.S.C. § 1311(a), reads as follows:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters, and (2) *the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable state law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective states.* . . . [Emphasis added.]

Section 1301 defines "natural resources" to include "fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life," and defines "lands beneath navigable waters within the boundaries of the respective states" as that area "seaward to a line three geographical miles distant from the coast line of each such state."

It is against the background of the case law confirming the continued vitality of states' rights to regulate commercial fishing within inland waters and the marginal sea, and congressional legislation to the same effect, that the trial court held that such rights had been preempted by the Bartlett Act, 16 U.S.C. § 1081 *et seq.*

This Court, on the other hand, ever mindful of the need to avoid the fostering of unnecessary and unintended friction between the federal and state governments, has been most cautious in invoking the doctrine of preemption where the national legislation does not clearly command it. This caution is exemplified by *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. at 443, discussed at length *infra,* where it was stated that:

> "In other words, such intent [to preempt state regulation] is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. . . ."

See also *Rice* v. *Santa Fe Elevator Corporation,* 331 U.S. 218 (1947); *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963); *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405 (1973).

It is apparent on the face of the Bartlett Act that it does not conflict with or otherwise preempt the state power over its fisheries that Virginia has exercised here. The federal law simply provides that it is not legal for a foreign flag vessel to fish in American waters, except pursuant to a treaty. It authorizes certain exceptions to be made, with the "concurrence of any State, Commonwealth, territory, or possession directly affected." The entire section is set out in Appendix A at 1-2.

Obviously, the general regulation of the fisheries in the three-mile zone was left to state control by the law, although it permitted the states to acquiesce in a license to foreign vessels on notice to Congress and at the request of the Secretaries of the Treasury, State, and Commerce Departments. It would take a strained reading of the language of the statute to find preemption here.

If there is any doubt from reading the language of the statute that Congress did not intend to preempt state authority in the three-mile zone by passage of the Bartlett Act, the authoritative statements in the reports of the respective Senate and House Committees should lay those doubts to rest. The Report of the House Merchant Marine and Fisheries Committee, H.R. Rep. No. 1356, 88th Cong., 2d Sess., reads:

> It was brought out at the hearings that the powers of the States in dealing with trespassers of their territorial waters would not be preempted by the passage of this bill and for those States already having sanctions, this bill would only supplement existing case law. [2 U.S. Code Cong. & Adm. News 1964 at 2183.]

So, too, was the view of the Senate Commerce Committee in Sen. Rep. No. 500, accompanying S-1988, 88th Cong., 1st Sess. (1963), at 4:

> This bill will not preempt the states of their powers against trespassers of their territorial seas. Some states now have sanctions, although they often are not as comprehensive as those which this bill would enact. The laws of the states would be effectively supplemented by the proposed bill.

The purpose and effect of the Bartlett Act was to provide policemen to enforce whatever restrictions the states had validly promulgated with regard to their fisheries. Far from preempting or demeaning state control, the statute provided means for effectuating state control.[4]

To read the Bartlett Act as preempting state authority in the three-mile zone would not only be inconsistent with the language of the statute and with its legislative history, it would require an inference that the Bartlett Act has repealed or amended, *sub silentio,* a large body of federal laws that both recognize and protect the state interests in the three-mile zone, including the Submerged Lands Act, *supra,* and others discussed below.

The Contiguous Fisheries Zone Act, 16 U.S.C. §§ 1091 *et seq.,* enacted on October 14, 1966, established an exclusive 9-mile fisheries zone contiguous to the states' 3-mile territorial seas. The final section of that Act, 16 U.S.C. § 1094, reads as follows:

> Nothing in this chapter shall be construed as extending the jurisdiction of the States to the natural resources beneath and in the waters within the fisheries zone established by this chapter or *as diminishing their jurisdiction to such resources beneath and in the waters of*

[4] The testimony at the hearings buttresses this conclusion. Hearings before the House Committee on Merchant Marine and Fisheries, on S. 1998, 88th Cong., 2d Sess. 64, 81, 93 130, 139 (1963); Hearings before the Merchant Marine and Fisheries Subcommittee of the Committee on Commerce of the U.S. Senate, on S. 1988, 88th Cong., 1st Sess. 27, 35 (1962).

> *the territorial seas of the United States.* (Emphasis added.)

Similar recognition of the rights of the individual states within their 3-mile territorial seas, is to be found in the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.,* enacted October 27, 1972, particularly in § 1451(h) of that Act, which encourages "the states to exercise their full authority over the lands and waters in the coastal zone."

The most recent development in the legislative area is the Fishery Conservation and Management Act of 1976. Pub. L. No. 94-265, 90 Stat. 331, approved April 13, 1976. By the terms of that Act, both the Bartlett Act, *supra,* and the Contiguous Fisheries Zone Act, *supra,* are repealed as of March 1, 1977. For purposes of the case at hand, two sections of the Fishery Conservation and Management Act of 1976 are particularly pertinent. Section 101 sets out the geographical extent of United States jurisdiction as being a zone one hundred and ninety-seven miles out from the three-mile marginal sea, over which the respective states retain jurisdiction. Section 306(a) of the same act reiterates the nature and extent of state jurisdiction:

> Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.

The reason for legislative deference shown to state sovereignty by these two sections is provided by the Report of the Senate Committee on Commerce, S. Rep. No. 416, accompanying S. 961, 94th Cong., 1st Sess. (1975), at 22:

> The boundaries of the [Fishery Conservation] zone are drawn so as to place the zone outside of the seaward boundaries of the individual coastal States, but not more than 200 nautical miles from the U.S. coastline. The seaward boundaries of the coastal States are defined in Section 2 of the Submerged Lands Act (43 U.S.C. 1301). In all cases, except with respect to Texas and Florida in the Gulf of Mexico where their seaward

boundaries are 9 miles from shore, State boundaries are located 3 miles from the coast. Although this creates an anomaly with respect to Texas and Florida, *it preserves the domestic breakdown of management authority between the States and the Federal Government which has prevailed since the founding of the republic.* (Emphasis added.)

In *Manchester* v. *Massachusetts,* 139 U.S. at 266, the final paragraph reads:

> We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the Statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State.

If the absence of Congressional action in this area persuaded the Court in 1891 that states retained the right to control fisheries, then the affirmation of this right contained in the recent Congressional legislation should persuade the Court in 1976 that the individual states have still not been preempted by Congress from regulating fisheries within the marginal sea.

B. The Power Of The Commonwealth Of Virginia To Regulate Fishing Within Its Boundaries Through Virginia Code Sections 28.1-60 And 28.1-81.1 Has Not Been Preempted By The Shipping Acts Or By Any Other Controlling Federal Law.

An even more tenuous claim to preemption than that offerred by the trial court has been put forth by Appellees. They, in their Motion to Affirm, have taken the position that the issuance of Certificates of Enrollment and License for vessels owned by Seacoast and its subsidiaries in the American fisheries, after affirmative action of the Maritime

Administration approving the transfer of such vessels to Seacoast and its subsidiaries, constituted a license to fish in Virginia waters, overriding Virginia law. The Appellees' brief in support of this proposition betrays a confusion as to the nature of the Maritime Administration proceedings as well as the roles of the federal government, which documents American vessels, and of the respective states, which issue licenses for the taking of fish within their jurisdictions.

The Maritime Administration proceedings were conducted under §§ 9 and 37 of the Shipping Act of 1916 (46 U.S.C. §§ 808 and 835). Following a hearing in which it was admitted that Seacoast and its subsidiaries were aliens within the definitions of the Shipping Act, the Maritime Administration permitted certain vessels to be transferred to Seacoast and its subsidiaries. Seacoast had indicated in its application that it intended to use the vessels in the American fisheries. Subsequently, in separate proceedings, the ship-owning companies applied to the Coast Guard for issuance of the usual Consolidated Enrollments and Licenses, which would constitute vessel documentation for each of the vessels.

The product of the Maritime Administration proceeding was a "transfer order" for each vessel, permitting the vessel to be "sold alien." (See Appendix D for a typical order issued in this case.) The product of the Coast Guard proceedings for vessel documentation, which are handled administratively without hearings, was the Consolidated Certificate of Enrollment and License, the typical vessel document for United States flag coastal fishing vessels.

The transfer orders which the Maritime Administration issued under 46 U.S.C. §§ 808, 835 did nothing more than to authorize the ownership of certain United States vessels by certain subsidiaries of a corporation which, by its own admission, is foreign owned. Neither of those sections can be read as admitting the Appellee's fleet into the fisheries of Virginia. Such was not the intention of either statute.

The Appellees rely heavily on portions of the documentation laws (46 U.S.C. §§ 251(a) and 263) to support their position that the federal government has preempted state authority to control admission to local fisheries. The particular part of Section 251 which is claimed to be applicable to the case at hand reads:

> (a) Vessels of twenty tons and upward enrolled in pursuance of sections 251-255, 258, 259, 262-280, 293, 306-316, 318, 321-330 and 333-335 of this title, and having a license in force, or vessels of less than twenty tons, which, although not enrolled have a license in force, as required by such sections, and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries.

Section 263 merely set out the form of license. The Appellees urge that the foregoing statutes be interpreted to mean that documentation, *i.e.*, enrollment and licensing, constitutes an affirmative grant of the right to participate in any state's local fisheries. However, the most which section 251(a) can be said to do is to limit the coasting trade and American fisheries to United States documented vessels. A United States documented vessel, engaged in the domestic trades, must have an enrollment and a license. The forms of enrollment and license are set forth in 46 U.S.C. §§ 259 and 263, respectively. Pursuant to 46 U.S.C. § 260, the vessel in question receives a single or consolidated vessel document, being an enrollment (permanent except in unusual circumstances) and a license (requiring annual certifications and renewals), which identifies the current use of the vessel. Because of differing inspection laws as to vessels in different trades, etc., the Coast Guard is required to know the current use of the particular American flag vessel.

The form of the license, specified in Section 263, is intended to identify the use intended by the owner and permitted by the laws of the United States. In the fishing context, this "license" has never been held to be preemptive of

the ability of states to license in their own territorial waters. In *Manchester* v. *Massachusetts* and those cases discussed in part I, *supra*, it can be seen that the grant of a federal license has not been held to override the independent power of the states to control local fishing activities.

Under the terms of such fishing vessel documentation, the vessel is privileged to do the following: (1) To navigate freely in the waters of all states; (2) To have the benefits of an American flag vessel while fishing in international waters including the benefit of fishery treaties to which the United States is a party; (3) To fish within the exclusively federally controlled fisheries conservation zone (3-12 miles from the U.S. coast until March 1, 1977 and then 3-200 miles pursuant to the Fisheries Conservation and Management Act of 1976); and (4) To fish in the territorial waters of the states, *provided* that state licenses are obtained and local fishing laws are complied with.

Accordingly, a federal vessel document does not amount to an affirmative grant of a right to take fish from Virginia waters in violation of its laws. This has been clear at least since 1855, when this Court allowed the forfeiture of a federally enrolled ship because it had engaged in dredging for oysters in violation of Maryland law. See *Smith* v. *Maryland*, 18 How. 71 (1855).

This Court in *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. at 447 rejected an argument similar to the one advanced here.

> An additional argument is advanced, however, based not upon the mere existence of the federal inspection standards, but upon the fact that appellant's vessels were actually licensed, 46 U.S.C. § 263, and enrolled, 46 U.S.C. §§ 259-60, by the national government. It is asserted that the vessels have thus been given a dominant federal right to the use of the navigable waters of the United States, free from the local impediment that would be imposed by the Detroit ordinance.

The opinion conceded that the license and enrollment entitled the vessel to enter the state waters without undue burdens being placed on it for sailing in those waters. But the license did not exonerate the vessel from the police power of the state.

> The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce. Thus, a federal licensed vessel is not, as such, exempt from local pilotage laws, *Cooley* v. *Board of Wardens*, 12 How. 299; or local quarantine laws. *Morgan's L. & T.R. & S.S. Co.* v. *Louisiana Board of Health*, 118 U.S. 455, or local safety inspections, *Kelly* v. *Washington*, 302 U.S. 1, or the local regulation of wharves and docks, *Cincinnati, P.B.S. & P. Packet Co.* v. *Catlettsburg*, 105 U.S. 559. Indeed, this Court has gone so far as to hold that a state, in the exercise of its police power, may actually seize and pronounce the forefeiture of a vessel "licensed for the coasting trade, under the laws of the United States, while engaged in that trade." *Smith* v. *Maryland*, 18 How. 74. [363 U.S. at 447.]

This Court has not retreated from its deference to local police power asserted against nationally licensed vessels. *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973). There is no reason to do so here where the state authority to act has such venerable and long-established legitimation, and where the Congress has repeatedly refused to invade the province of the states.

III.

Neither Virginia Code § 28.1-60 Restricting Menhaden Fishing In The Chesapeake Bay To Virginia Residents Nor Virginia Code § 28.1-81.1 Limiting Licenses For Commercial Fishing To Citizens Of The United States Violate The Equal Protection Clause Of The Fourteenth Amendment.

A. Virginia's Exclusion Of Non-residents From The Menhaden Fishery Within Its Inland Waters Is A Valid Exercise Of Its Police Power To Regulate And Conserve Its Fisheries Resources And Is Permissible State Regulation Under The Fourteenth Amendment.

Virginia Code § 28.1-60 prohibits non-residents from taking fish in the waters of the Commonwealth for converting the same into oil, fishmeal, fishscrap, etc., with an exception that allows them to fish for menhaden within the territorial sea; the law effectively prohibits non-residents from taking menhaden within the waters of the Chesapeake Bay. By this statute, Virginia seeks to regulate the chief commercial fishery operating within its inland waters.

The lower court found this provision in violation of Appellees' rights under the Equal Protection Clause relying on *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948). The lower court's reliance on *Takahashi* is clearly misplaced. That case did not involve a classification between residents and non-residents. California there had singled out a group of legal residents definable by race and national origin, although there was no rational basis offered for the classification except a prejudice against Japanese not eligible for citizenship.

As this Court made clear in *Dandridge* v. *Williams*, 397 U.S. 471, 485, n. 17 (1970), racial discrimination will render a classification inherently suspect. Unlike *Takahashi*, which did involve racial discrimination, the challenged Virginia statutes are free from that taint. Neither do they affect sensitive First Amendment rights, which the Court in *Dandridge* separately treated. 397 U.S. at 484. Instead, the traditional rules governing equal protection standards govern this case; they are expressed by the Court in *Dandridge* in the following terms:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable ba-

sis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *Chicago*, 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426. [397 U.S. at 485.]

See also *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); *Village of Belle Terre* v. *Boraas, supra.*

Classification in terms of residency are to be judged by the same standard. Although the Court has struck down "durational residency" requirements, where it found no compelling state interest for imposing them in the face of a claim of a fundamental right, it has also sustained residency requirements—even "durational residency" requirements, where there is a substantial state interest to be protected by that classification. Thus, the Court pointed out in *Sosna* v. *Iowa*, 419 U.S. 393, 406 (1975):

> State statutes imposing durational residency requirements were of course invalidated when imposed by States as a qualification for welfare payments, *Shapiro* [v. *Thompson*, 394 U.S. 618 (1969)], and for voting, *Dunn* [v. *Blumstein*, 405 U.S. 330 (1972)], and for medical care, [*Memorial Hospital* v.] *Maricopa County*, [415 U.S. 250 (1974)]. But none of these cases intimated that the States might never impose durational residency requirements, and such a proposition was in fact expressly disclaimed. What those cases had in common was that the durational residency requirements they struck down were justified on the basis of budgetary or record-keeping considerations which were held insufficient to outweigh the constitutional claims of the individuals. But Iowa's divorce residency requirement is of a different stripe . . . .
>
> Iowa's residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience. . . .

It must be emphasized that the instant case involves no "durational residence" requirement at all. And it is evident that the *Shapiro, Dunn,* and *Maricopa County* cases, far from casting doubt on nondurational residence requirements, lend credence to them.

Thus, what we have here is only a residence requirement which creates no racial classification, affects no First Amendment rights, and is not concerned with any "fundamental rights." See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973). The appropriate Equal Protection standard calls for a determination only of whether the Virginia classification "is reasonable." We submit that there should be no doubt that it is supported in reason.

As for tidewaters or inland waters such as those regulated by Virginia Code § 28.1-60, the paramount interest of the states has been long established by the decision of this court in *McCready* v. *Virginia*, 94 U.S. 391 (1877). *McCready* held that Virginia's ownership of the riverbeds, waters and fisheries resources therein was a valid basis upon which to exclude nonresidents from taking commonly owned property of the state. *McCready* is the only case in which this Court has addressed the issue of the states' authority to exclude non-residents from exploiting resources in inland waters. Its premise that a state owns the resources within its inland waters has been given renewed vitality by Congress in the Submerged Lands Act.

Virginia Code § 28.1-60 was enacted by the legislature with knowledge of the nature of menhaden, the economic importance of the menhaden industry, and the necessity to effectively conserve this important resource. As set out previously, it is against a young fishing stock that the Virginia menhaden effort is directed. Virginia menhaden producers, the Virginia Institute of Marine Science and the National Marine Fisheries Service carefully monitor the menhaden

catch; the producers then adjust the season and fishing effort as necessary to conserve the resource. Virginia alone among the Atlantic states imposes seasonal limits on fishing for menhaden, limitations on net mesh size, and protects selected waters for small fish development. The purse seine used to take menhaden is a highly efficient method of taking large schools of fish. For this reason, Virginia has restricted the minimum size of net mesh used in the purse seines in order to insure sufficient escapement of the smaller fish. Such escapement is vital to the goal of maintaining level stocks from year to year because it insures that sufficient numbers will survive to spawn. Without residual stocks of fish to reproduce and have their offspring return, the resource in Virginia would become rapidly and dangerously depleted.

An important factor in net size regulation is the particular difficulty in its enforcement. During the menhaden season, boats are scattered throughout the Bay and coastal waters often leaving and returning to port in the hours of darkness. Therefore, boarding boats for inspection while actively fishing or under way is not a practical method of enforcement. Aerial surveillance is ineffective for net size enforcement. The only feasible means of enforcing the net size regulation is inspection of vessels while gathered in port. Such local dockside inspections would be impossible if non-resident vessels were fishing in the Bay and landing the catch outside of Virginia.

The foregoing facts lead to the following conclusions: (1) Because the fishing in the Chesapeake Bay is oriented against a young rather than mature fish, a highly effective regulatory system capable of maximum enforcement is required; (2) The net size regulation, which is central to the conservation effort, is practically unenforceable against non-residents; and (3) Non-residents lack the motivation derived from natural self-interest to preserve local fishery stocks and would tend to seek the most immediately productive

method of fishing without regard for the long term consequences of their acts. Those conclusions are entirely reasonable and amply support the validity of Virginia's effort to manage and conserve an economically significant and delicate fishery resource.

We submit that the reasons shown for the enactment of Section 28.1-60 are valid and sufficient to satisfy the tests established by this Court.

B. Virginia Code § 28.1-81.1 Is A Valid Exercise Of The State's Police Power To Regulate And Conserve Its Fisheries Resources And Is Permissible State Regulation Under The Fourteenth Amendment.

Virginia Code § 28.1-81.1 denies the issuance of a commercial fishing license for the taking of food fish or menhaden in Virginia waters to any person, partnership or corporation not a citizen of the United States. The statute provides a definition for a citizen corporation based on the percentage of control and stock ownership by United States citizens.

The lower court held with respect to this provision that federal law had preempted the states' control of commercial sea fisheries and pointedly did not reach the equal protection issue raised by plaintiffs below.

The portion of the Virginia Code addressed here, § 28.1-81.1, is attacked by Appellees on Equal Protection grounds because it purports to classify American citizens differently from aliens. It is important to recognize, however, that Appellees' exclusion from the Virginia fisheries was not based on the general provision for exclusion of aliens, but rather because they fell into the category of a foreign-owned corporation. The question presented here, then, is not whether any alien may be denied a license but whether these foreign-owned corporations may be denied a license.

As this Court only recently emphasized, in *Hampton* v. *Mow Sun Wong*, 44 L.W. at 4740 n. 20:

> [T]he holding [in *Sugarman* v. *Dougall,* 413 U.S. 634 (1973)] did not preclude individualized determinations that particular persons could be refused employment on the basis of noncitizenship, or that citizenship could be required as a qualification for appropriately defined classes of positions. See 413 U.S., at 646-647.

It is that kind of question that is presented here. Whether there was a valid state policy that could justify exclusion from territorial waters of the Appellees, foreign-owned corporations who do not qualify as aliens subject to the protections emanating from the Naturalization Clause of the Constitution.

Recent cases in this Court dealing with discrimination against aliens are not applicable in the context of this case, where ample grounds are available to the State for justifying its policy of exclusion of foreign-owned corporations, *Graham* v. *Richardson, supra, In Re Griffiths,* 413 U.S. 717 (1973), and *Sugarman* v. *Dougall, supra.* The *Graham* case dealt with an Arizona requirement of a fifteen year residence in order to qualify for state welfare benefits. There this Court, while treating aliens as a suspect classification, meticulously avoided abolition of the substantial state interest doctrine in contexts other than that of welfare benefits. 403 U.S. at 374.

Similar limitations can be applied to *Sugarman, supra,* and *Griffiths, supra.* Both of these cases dealt specifically with an individual's right to employment; *Sugarman* concerned a New York statute excluding aliens from state civil service positions; *Griffiths* concerned a Connecticut court rule denying an alien resident admission to the bar. Again, the Court was careful to repeat that the substantial state interest doctrine has continuing validity in contexts other than those involving the individual's right to employment.

Great reliance has been placed upon *Takahashi* v. *Fish and Game Commission, supra,* by this Court in the cases noted above. It must be emphasized not only that Virginia Code § 28.1-81.1 is devoid of the racial overtones

which affected the California law in *Takahashi,* but also that the climate surrounding the issue of conservation has undergone radical changes since 1948 when that decision was handed down. Indeed, the frontier mentality which envisioned inexhaustible natural resources has been almost altogether replaced. See generally, *Department of Game of Washington* v. *Puyallup Tribe,* 414 U.S. 44 (1973) and *Corsa* v. *Tawes,* 149 F.Supp. 771 (D. Md. 1957).

The standards applicable to Virginia Code § 28.1-81.1 in this equal protection challenge are the time-honored measures for laws regulating economic and business activities as set forth in Part II A., *supra.* Only in cases where *individual* rights are concerned has a majority of this Court deemed it necessary to apply a higher standard of review to laws classifying in terms of alienage. *Graham* v. *Richardson, supra; In Re Griffiths, supra; Sugarman* v. *Dougall, supra.* The instant case, however, involves a challenge to a law regulating commercial activity by a *corporation* denied the right to participate in such activity because it has been classified a non-citizen. In no case dealing with classifications between citizen and non-citizen corporations has this court called for a showing of a compelling state interest.

Therefore, the summarized standards by which Virginia Code § 28.1-81.1 must be reviewed are: (1) The Classification must be on grounds relevant to the state's objective; (2) The statute is presumed to be constitutional and will not be set aside if any state of facts reasonably may be conceived to justify the classification therein; (3) The state's objectives and the classification must be considered in the context of the fisheries in Virginia waters, the dangers posed by foreign fishing practices, the long history of Virginia's regulation of these natural resources, and the difficulty of enforcement of such regulations against determined efforts to overfish.

Whereas native fishermen traditionally rely upon the local stock for their livelihood, the alien controlled oper-

ators have no such vested interest in the conservation of those stocks. Indeed, it is apparent from the pattern of foreign fishing in the past that maximum immediate harvest is the sole objective of these foreign operations. The pattern of foreign interests fishing off our coasts has been to move into fisheries, take as many fish as possible without regard for the capacity of the fish to reproduce, and then, once the fisheries have been exhausted, to move on to still other waters to repeat their depredations. Virginia has experienced the damaging effect of intensive foreign fishing efforts off her coasts. The river herring industry, once directly supportive of the employment of thousands of Virginians and a healthy fisheries resource for more than 100 years, was destroyed in a commercial sense when the Soviet fishing fleet directed its efforts against it. These facts have been amply documented in hearings on the 200 mile limit bill conducted by Congress in Washington and in many coastal states, including Virginia,[5] and were incorporated in the congressional findings in the preface to the Fisheries Conservation and Management Act of 1976, set out in Appendix E.

Under the traditional equal protection standards, Virginia Code § 28.1-81.1 is presumed to be constitutional and will not be set aside if any set of facts reasonably may be conceived to justify the classification therein. Considering the overwhelming evidence of foreign interests practicing predatory fishing practices off our coasts, the Virginia legislature could reasonably have sought to protect its fisheries on the grounds (1) That foreign interests controlling a U.S. corporation with vessels fishing in the Virginia waters would lack long-range motivation to conserve the resource; (2) That foreign interests would continually attempt to maximize short-term profits from their investment; (3) That this

[5] Hearings on Extending the Jurisdiction of the United States Beyond the Present Twelve Mile Fishery Zone, Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, 93rd Cong., 2nd Sess., (1974).

desire to maximize profits coupled with no interest in conservation would lead to overfishing and disregard for regulations largely dependent upon voluntary compliance; (4) That with the imminent enactment of the 200 Mile Limit Bill and other pressures upon foreign fishing vessels in United States waters, foreign fishing interests would seek to obtain U.S. shell corporations through which to document vessels in the fisheries reserved for Americans in view of the lack of effective legislation prohibiting such techniques; (5) That because of the long-term economic advantage in conserving fishery stocks, United States corporations engaged in fishing would abide by conservation measures and would not be motivated by short-term profit to overfish the resource. These afford rational bases upon which the classification between citizen and non-citizen was made. The discrimination against non-citizen corporations was not based on prejudice or whim but a singular desire to conserve and protect the bounty of the fisheries resources within the Virginia territorial waters. The classification is reasonably related to this objective and should be upheld.

CONCLUSION

The taking of fish from state waters is not an incident of interstate commerce, and in all events the Virginia statutes in dispute relating to the taking of such fish do not impose an undue burden upon interstate commerce in violation of Article I, Section 8 of the United States Constitution.

Neither the Bartlett Act (16 U.S.C. § 1081, *et seq.*), nor other controlling federal law, preempt the power of individual states to regulate fisheries in their marginal seas or inland waters. Neither Virginia Code § 28.1-60 restricting menhaden fishing in the Chesapeake Bay to residents of Virginia nor Virginia Code § 28.1-81.1 preventing the issuance of licenses for commercial fishing to foreign-owned corporations violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

For the foregoing reasons, the judgment of the United States District Court for the Eastern District of Virginia should be reversed.

Respectfully submitted,

AMMON G. DUNTON, JR.
DEXTER C. RUMSEY, III
MATSON C. TERRY, II
Dunton, Simmons & Dunton
P. O. Box 5
White Stone, Virginia 22578

Attorneys for Amici Curiae

Virginia Seafood Council
L. D. Amory & Company, Inc.
Chesapeake Herring Corp.
The D. L. Edgerton Co.
Lance C. Fisher
J. W. Ferguson Seafood Co., Inc.
Fass Bros., Inc.
Mr. Frosty Seafood Company
J. H. Lewis Seafood Company
W. F. Morgan & Sons, Inc.
RCV Seafood Company
Shackelford-Schlifer Seafood Corp.
Virginia Seafoods, Inc.
Zapata Haynie Corporation

PHILIP B. KURLAND
Two First National Plaza
Chicago Illinois 60603
(312) 372-2345

Of Counsel

APPENDIX

APPENDIX A

Interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3

[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Supremacy Clause, U.S. Const. art. VI, ¶ 2

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Equal Protection Clause, U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

16 U.S.C. § 1081

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental

Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Nothwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

Va. Code § 28.1-60

Non-residents generally.—(1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.

(2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.

(3) *License for taking menhaden fish.*—A nonresident person, firm or corporation may take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, seine, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virginia would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent, upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the licensee until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plaintiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or corporation as if such nonresident person, firm or

corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Va. Code § 28.1-81.1

Licenses for taking fish restricted to United States citizens.—(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of

its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five percentum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

APPENDIX B

STATEMENT BY AMMON G. DUNTON, JR., ESQUIRE, BEFORE THE SENATE COMMITTEE ON AGRICULTURE, CONSERVATION, AND NATURAL RESOURCES

January 27, 1975

Mr. Chairman, members of the Committee, I am Ammon G. Dunton, Jr., a member of the firm of Dunton, Simmons & Dunton. We act as counsel for Zapata Haynie Corporation, a Virginia corporation and a major participant in the American menhaden fishing industry.

I assisted Senator Manns in the drafting of S.B. 941. It has been reviewed by Commissioner Douglas, who is here to testify in support of this legislation.

The bill would prohibit the licensing of foreign nationals (whether they be acting as individuals, partners, or controlling elements of corporations) from engaging in the taking of commercial fish from the waters of the Commonwealth.

Paragraph (a) of the first section of the bill sets forth the words of prohibition, and the fact that the requirement that licenses be granted only to U.S. citizens does not eliminate any other requisite to the issuing of licenses as required by the Code.

Paragraph (b) defines a corporation deemed a U.S. citizen.

Paragraph (c) sets forth provisions designed to eliminate evasion of the 75% ownership requirement. These are taken from the federal Shipping Act of 1916 definition of corporate citizen, which has been found to be effective through the years.

Section 2 of the bill declares an emergency to exist.

Evidence taken around the country in the hearings on the 200 mile limit bill now pending before the Congress in

Washington has established that American fisheries should be reserved for American citizens because they alone have the true incentive to conserve and maintain our domestic fishery resources. The American fishing industry, particularly the menhaden segment, has exhibited a fiduciary quality with respect to the management of its fishing effort. American menhaden companies have assisted in studies regarding the life cycle and movement of menhaden and have responded to requests from the National Marine Fisheries Service for reduction in fishing efforts in certain years. As a result the present menhaden stocks are relatively plentiful in areas where foreign fishing has not interfered with the resource, such as in the Chesapeake Bay and in portions of the Gulf of Mexico. On the other hand, where foreign vessels have harvested unknown amounts of unknown species, which we suspect include substantial quantities of menhaden, large scale reductions in the availability of fish have occurred. It is, I believe, fair to say that these foreign vessels are not motivated by a desire to preserve fishing stocks, but instead engage in "strip fishing" which produces large short-term profits but destroys the resource.

The present law in Virginia, contrary to most impressions, does not reserve our domestic fisheries resource to U.S. citizens in all cases.

The simplest means by which foreign owners can fish within Virginia waters is to acquire a Virginia corporation having American documented vessels. While it is true that foreign built or documented vessels will not be permitted to fish within Virginia waters, foreign owned American vessels can.

Within the past few months the control of approximately one-third (⅓) of the American menhaden vessels has passed to foreign interests; and despite objections raised by other American participants, unconditional approvals of

these sales were granted by the present Administration in Washington, ostensibly because there were no clear federal legislative provisions to the contrary. Similarly, a major portion of the American salmon fleet on the west coast has recently been acquired by Japanese interests, in that instance without so much as a hearing being permitted in order to allow American industry to object. The transactions I have referred to are the sale of the Smith group of companies to Hanson Trust and the sale of Whitney-Fidalgo Seafoods, Inc. to Kyokuyo Ltd. of Japan. These two unconditional sales to foreign interests (although conditions might have been imposed by the Maritime Administration) have allowed substantial foreign entry into the American fishery itself for the first time. Here in Virginia, I understand Japanese investment has been made in the lobster industry. Furthermore, these foreign interests can expand their position almost without limit, and can profit from the transactions by disposing without notice to anyone of their stock investments to other foreign interests who then will also have established positions within the American fishery.

As an example, I will give you a hypothetical situation which could occur under existing federal and Virginia law as it is presently being interpreted by the administrative agencies involved. Hanson Trust, through intermediary American corporations, has acquired sixty-eight American menhaden vessels licensed for use in the American fishery. If Hanson should retain approximately one-half of the vessels for its own use, as it has stated it intends to do, it could sell the stock of a corporation owning the balance of vessels to a company controlled by, for instance, Russians. The Russians, in turn, could fit the vessels out for fishing and enlarge them if they saw fit, and fish with impunity within the Chesapeake Bay.

It is true that American masters and watch officers must be in charge of the vessels and the vessel owning corporation would need some American nationals as officers and directors; but it is quite possible to find American citizens who are willing to serve in these capacities if sufficient compensation is paid. Also, theoretically, it is true that the same laws affecting the taking of fish by Americans would apply to the Russian operators. In point of fact, enforcement of fishing laws and regulations would be difficult in the face of any determined effort to overfish by any particular organization.

The practical answer to the problem is to adopt legislation clearly prohibiting the issuance of licenses for the taking of commercial fish from Virginia waters if the persons to whom the licenses would be issued are controlled, directly or indirectly, by foreign nationals. The enactment of such legislation would implement the long standing federal and state policy of reserving the American fisheries for American citizens.

I strongly urge the adoption of S.B. 941 on an eme. gency basis.

I thank you for the opportunity to appear before you today and to present these comments.

APPENDIX C

ZAPATA HAYNIE CORPORATION STATEMENT BY ALLEN W. HAYNIE, PRESIDENT OF ZAPATA HAYNIE CORPORATION, BEFORE THE HOUSE OF DELEGATES COMMITTEE ON THE CHESAPEAKE AND ITS TRIBUTARIES

February 14, 1975

Mr. Chairman, members of the Committee, I am Allen W. Haynie of Reedville, Virginia, and I serve as President of Zapata Haynie Corporation. I am grateful for this opportunity of appearing today to present my views and support of Senator Manns' Bill to restrict the issuances of licenses for the taking of commercial fish to the citizens of the United States.

Our company is a part of the menhaden industry. Our plants are located on the Atlantic and Gulf coasts and we produce fish meal, fish oil, and condensed and/or dried fish solubles.

The menhaden fishing fleet in the United States numbers approximately 125 to 140 vessels which range in size from 140 to 185 feet in length. They carry a crew of 17 men each and together with supporting processing plant and shore-side crews, the industry's employment totals between 5,000 to 6,000. Our company operates 36 vessels, 25 airplanes, 5 plants and employs about 1,300 people of which approximately half are Virginians.

In addition to our menhaden operation, our company previously conducted operations in the river herring fishery until the resource was destroyed by foreign off-shore fishing. We dismantled our plant, sold our equipment and vessels, and discontinued operations some months ago.

Dr. Jackson Davis of the Virginia Institute for Marine Science states, in one of his reports to our trade association about 1965, that the river herring resources had remained in

a very healthy and stable condition for about 100 years, and was perhaps the most stable resource along the Atlantic coast. It was about 1966 that the foreign off-shore fishing fleets began to operate south of Ocean City, Maryland; and I personally stated at that time to Ambassador Donald McKernan, who was Special Assistant for Fisheries to the Secretary of State, that if this great foreign fleet continued to fish on the river herring resource, it would be extinct within 5 years. Several bi-lateral agreements negotiated by our State Department made very feeble and non-productive attempts to discourage foreign fishing of this resource, and as stated earlier, it no longer exists in quantities justifying commercial ventures of any size. Because of this, our canning operation, which was established at Mundy Point, Virginia, to process river herring in 1880, has been closed. It employed 300 persons in 1965. (Attachment A—Chesapeake Fisheries Historical Catch Statistics, Alewives, 1880-1972).

It is our opinion that due to inadequate government surveillance, we are unable to determine the extent to which foreign fishing has affected our menhaden resource. A very large Russian purse seine fleet has been developed and has been operating on the Atlantic during the past 3 years. (Attachment B—National Marine Fisheries Service Surveillance Report). This new purse seine capacity of the Russians, employing large vessels capable of operating the largest kind of purse seines, is perhaps as great, if not greater, than that of the entire U.S. menhaden fleet.

For the last 50 years very large schools of menhaden have migrated from the northeast, the Jersey coast and the Chesapeake Bay south to the Carolinas, where a fishery had been successfully conducted during November and December in the Beaufort-Morehead City, North Carolina area. While some say it is merely a coincidence, I believe

that the existence of this Russian purse seine fleet is the reason that the fish have not reached North Carolina in commercial quantities during the past 3 years. The Russian seiners operate in the migratory path of the menhaden. Where there were 5 plants operating in North Carolina in the 1960's only 1 now continues and this on a small scale.

Although foreign fishing effort has seriously depleted marine resources beyond our territorial sea, such foreign effort has not yet been undertaken in substantial quantity within our territorial waters or the Chesapeake Bay. It has come to our attention that by means of the use of a shell corporation owned entirely by foreign nationals and the use of American flag vessels, foreign interests can, if they so desire, fish within the Chesapeake Bay and within the territorial waters of this Commonwealth. I feel that any such foreign fishing effort within our waters would be seriously detrimental to the interests of the citizens of this country and this state. I feel that this loophole should be closed by appropriate emergency legislation.

In my opinion, the United States has become a second-class fishery nation which, to a great extent, is a result of this unwarranted foreign destruction of fisheries off our coast. In excess of 75% of the fin fish caught off our coast are caught by foreign fisherman. Only 25% is still controlled by U.S. fishermen. Menhaden represents more than 40% of the total tonnage of fin and shell fish landed by U.S. fishermen.

Therefore, after giving this matter serious deliberation, I urge your support and passage of this vital legislation.

[Note: The attachments referred to in the foregoing statement are set forth in full in the Appendix to the Brief Amici Curiae in support of Statement as to Jurisdiction filed in this Court on behalf of Virginia Seafood Council *et al.*, on March 8, 1976 at pages App. 24-31.]

APPENDIX D

U.S. Department of Commerce
Maritime Administration
Washington, D.C. 20230
Transfer Order No. MA-13410
Approving the Sales Alien of the Oil Screw
Ringold Bros.

Whereas, An application has been filed by Richard Reiss, New York, New York, for the approval required by Sections 9 and 37 of the Shipping Act, 1916, as amended (46 U.S.C. 808 and 835), of the sale of the oil screw Ringold Bros., Official No. 209216, to Seacoast Products, Inc., a Delaware corporation but not a citizen of the United States within the meaning of Section 2 of the Shipping Act, 1916 as amended:

It Is Ordered, This 6th day of May, 1974, that the approval required by Sections 9 and 37 of the Shipping Act, 1916, as amended (46 U.S.C. 808 and 835), of the sale of the oil screw Ringold Bros., Official No. 209216, to a domestic alien controlled corporation, as above set forth, be, and it is hereby granted; and

It Is Ordered Further, That this approval shall be null and void unless the sale alien, hereby approved, is effected within one year of the date of such approval.

Administrator
Maritime Administration

/s/ VIRGINIA J. O'BRIEN
Virginia J. O'Brien
Assistant Secretary

USCOMM-MA-DC

APPENDIX E

Section 2(a)(1-5) of Fisheries Conservation and Management Act of 1976, Public Law 94-265, 90 Statutes 331(2)(a)(1-5)

CONGRESSIONAL FINDINGS OF FACT

The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis. . . .